In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-811

GORDON REEVES, PETITIONER

v.

THE FEDERAL ENERGY ADMINISTRATOR AND
THE COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet App. A) is not yet reported. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on November 27, 1974. The petition for a writ of certiorari was filed on December 26, 1974. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 87 Stat. 27, and 28 U.S.C. 1254(1).[1]

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[1]See also Section 5(a) of the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 633, incorporating Section 211(g) by reference.

QUESTIONS PRESENTED

Federal Energy Office (F.E.O.) Regulation 10 C.F.R. 210.62(a) prohibits suppliers of allocated gasoline from modifying normal business practices to circumvent the allocation regulations. During the fuel crisis of February 1974, F.E.O. amended the regulation by adding Section 210.62(b), providing that preferential treatment to regular customers would be considered a variation from normal business practice. The questions presented are:

1. Whether the Temporary Emergency Court of Appeals correctly held that F.E.O. was not required by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, to publish a general notice of proposed rulemaking in the Federal Register 30 days prior to the implementation of Section 210.62(b), where good cause existed to make that section effective immediately.

2. Whether the Temporary Emergency Court of Appeals correctly held that the Emergency Petroleum Allocation Act of 1973, P.L. 93-157, 87 Stat. 627, does not require that amendments to regulations issued under Section 4(a) of the Act be submitted to the Federal Trade Commission and the Attorney General for comment on whether such amendments would tend to create or maintain anti-competitive practices or situations inconsistent with the antitrust laws.

3. Whether the Temporary Emergency Court of Appeals correctly held that F.E.O. acted within its statutory authority in adopting Section 210.62(b) and that the regulation was neither arbitrary nor discriminatory and has a rational basis.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Administrative Procedure Act, 80 Stat. 383, 5 U.S.C. 553, and the Emergency Petroleum Allocation Act of 1973, P.L. 93-157, 87 Stat. 627, as extended by P.L. 93-511, 88 Stat. 1608, are set forth at Pet. Apps. C and D. 10 C.F.R. 210.62(b) is set forth at Pet. App. E 66. 10 C.F.R. 210.62(a) is set forth in the Appendix to this brief in opposition.

STATEMENT

Petitioner seeks review of a decision of the Temporary Emergency Court of Appeals upholding the validity of an amendment (10 C.F.R. 210.62(b)) to the Mandatory Petroleum Allocation and Price Regulations (10 C.F.R. Parts 210-212) which prohibits retail gasoline service station operators from changing their normal business practices to reserve all or part of a monthly allocation for regular customers. Prior to the amendment, 10 C.F.R. 210.62 had prohibited deviations from normal business practices to circumvent allocation regulations (App., *infra*). When a practice of favoring regular customers arose during the fuel crisis of early 1974, the Federal Energy Office expressly prohibited such discriminatory sales practices by the amendment to 10 C.F.R. 210.62 in question, which redesignated the existing text as subsection "(a)" and added a new subsection "(b)" (Pet. App. E), 39 Fed.Reg. 5311, February 8, 1974.

The court of appeals, reversing the United States District Court for the District of Arizona, found that the amendment was issued in accordance with the rule-making procedures of the Administrative Procedure Act, 5 U.S.C. 553; that it did not have to be submitted for comment to the Attorney General and the Federal

Trade Commission pursuant to Section 6(c)(3) of the Emergency Petroleum Allocation Act of 1973, P.L. 93-157, 87 Stat. 627 (the EPAA); and that it was neither arbitrary nor discriminatory, and had a rational basis (Pet. App. A).

The history of the regulations is as follows. Congress responded to the domestic shortage of petroleum resulting from the imposition of an embargo by oil-producing nations by passing the Emergency Petroleum Allocation Act of 1973. Section 4 of that Act directed the President to establish regulations to allocate available supplies of crude oil and refined petroleum products and to control their prices. To do this the Federal Energy Office was created by Executive Order 11748, 38 Fed. Reg. 33575, December 4, 1973.[2] On December 11, 1973 it published proposed allocation and price regulations, 38 Fed.Reg. 34414, which it forwarded to the Attorney General and the Federal Trade Commission for comment pursuant to Section 6(c)(3) of the EPAA.

Final regulations were adopted on December 27, 1973 (Mandatory Fuel Allocation Regulations, 39 Fed.Reg. 744 *et seq.*, January 2, 1974), in accordance with the timetable established by Congress in Section 4(a) of the EPAA. They were recodified in 10 C.F.R. and renumbered on January 15, 1974, 39 Fed. Reg. 1924.

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[2]The functions of the Federal Energy Office were transferred to the Federal Energy Administration, created by the Federal Energy Administration Act of 1974, P.L. 93-275, 88 Stat. 96, May 7, 1974, by Executive Order 11790, 39 Fed. Reg. 23185, June 25, 1974.

The impact of the embargo in the form of shortages of gasoline available for retail sale became severe during the early months of 1974. As a result of the shortage, there were extreme disruptions in ordinary market mechanisms, especially in the retail sale of gasoline. Among other things, F.E.O. received information that some retail gasoline service stations were reserving all or part of their monthly allocations for persons recognized as "regular customers," and transient customers, who were formerly served, were being turned away (R. I 44-45).[3] In response to this development (R. I 44-47, pars. 15-18 and 20), F.E.O. amended its regulations by adding the amendment at issue here.

ARGUMENT

1. Petitioner contends (Pet. 2, 14-20) that F.E.O.'s immediate implementation of its amended regulation violated the Administrative Procedure Act and that the court of appeals improperly found "*post hoc*" reasons for upholding the regulation. But F.E.O. fully explained the reason for immediate implementation of the amendment in the four-paragraph preface to its regulation (see Pet. App. E 65-66). The court of appeals, in turn, carefully considered these stated reasons for implementing the amendment, and found that F.E.O. had determined that "normal rulemaking procedures were 'impracticable' and that 'good cause exists' due to the need for 'immediate guidance' " to have the rules apply im-

[3] "R. I" refers to the first volume of the stipulated record on appeal, which we are lodging with the Clerk. The references are to the affidavit of Mr. William N. Walker, then general counsel of the F.E.O.

mediately (Pet. App. A 32). The court concluded that "the F.E.O. intended from the outset to comply with the provisions of [5 U.S.C.] §§553 (b)(B) and (d)(3)" allowing an agency to adopt an immediate regulation where good cause exists for deviating from normal notice (*ibid.*, footnote omitted). The court also noted that F.E.O. could have characterized the amendment as interpretive, in which case there would have been "no need for [it] to explain its decision to dispense with the 30-day notice requirement," but had not done so. The court of appeals examined whether good cause for the immediate enforcement of the regulation in fact existed, considering the special circumstances at the time the regulation was issued, and properly held that it did (Pet. App. A 32-33). This case, thus, contrary to petitioner's contention, does not present an example of a *post hoc* rationalization of an agency decision to issue an emergency regulation.

2. Petitioner argues (Pet. 25) that this Court should grant its petition because the court of appeals gave "short shrift" to its argument that every substantive amendment to the Mandatory Petroleum Allocation and Price Regulations must be submitted to the Attorney General and the Federal Trade Commission pursuant to Section 6(c)(3) of the EPAA (see Pet. App. D 62-63 for text of the provision). The court of appeals, however, considering in some detail the language of the Act, its legislative history, and the purpose of Justice Department and Federal Trade Commission approval of regulations (Pet. App. A 33-35), concluded that such approval was contemplated only for initial regulations. As the court concluded (Pet. App. A 35):

> The two-step process envisioned, then, was initial submission of the program to the Attorney General and the FTC, with subsequent review of the bill and actions "taken pursuant thereto" without submission of each action on a piecemeal basis. In light of the emergency nature of the authority delegated to the FEO and the difficulty of its duty to establish com-

plex but fair procedures within a short time, a requirement that it submit any and every amendment to the Attorney General and the FTC would be counterproductive. We do not believe that the Act itself or the legislative history thereof establish such a requirement.

3. The court of appeals also properly concluded that Section 210.62(b) was within the statutory authority of F.E.O., was neither arbitrary nor discriminatory, and had a rational basis. The court correctly found that in issuing Section 210.62(b) F.E.O. was "attempting to minimize the impact of the shortage by spreading what gasoline there was to as many people as possible" (Pet. App. 38). This did not constitute an unauthorized rationing system, as petitioner suggests (Pet. 22). Section 210.62(b) did not provide any particular amount of gasoline for each customer but only tended to insure equal access to what was available. The pursuit of this goal was clearly a reasonable exercise of F.E.O.'s power and was in furtherance of the statutory objectives.[4]

The decision of the Temporary Emergency Court of Appeals does not conflict with any decision of this Court or of any other court of appeals, and there is no broad question of statutory interpretation or administrative law raised by the case. Additionally, should an oil crisis comparable to that of the early months of 1974 arise again, there is no indication that either the present statutes or present regulations will be in effect.

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[4]For the text of the rather broad statutory objectives see EPAA, Section 4(b)(1), Pet. App. D 58-59.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1975.

APPENDIX

Federal Energy Office Regulation, 10 C.F.R. 210.62, 39 Fed. Reg. 1931, before amendment of February 8, 1974, 39 Fed. Reg. 5311.

§ 210.62 **Normal business practices.**

Suppliers will deal with purchasers according to normal business practices. Nothing in this program shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for products. However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (*e.g.*, COD purchasers) during the base period, nor may any supplier modify any other normal business practice so as to result in circumvention of any provision of this chapter.

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF

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INDEX

	Page
1. The Administrative Procedure Act Issue	1
2. Submission for Antitrust Review	4
3. The Rationality of Standardless Imposition of Retail Allocation on Service Stations	5

Citations

Cases:

Burlington Truck Lines, Inc., v. United States, 371 U.S. 164, 169 (1962)	2
California v. Simon, 504 F.2d 750, (Em.App. 1974)	2
Columbia Broadcasting System v. U.S., 316 U.S. 47 (1942)	3
De Rieux v. The Five Smith, Inc., 499 F.2d 1303 (Em.App. 1974)	2,3
SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)	2

Other Authorities:

Bonfield, Military and Foreign Affairs Rulemaking Under the APA, 71 MICH. L. REV. 221, 304 (1972)	3

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PETITIONER'S REPLY BRIEF

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1. The Administrative Procedure Act Issue.

The Government denigrates the importance of this case by contending (BR. p.7) "there is no indication that either present statutes or present regulations will be in effect" if petroleum again becomes scarce. This is pure speculation. The contrary assumption is warranted.

The EPAA has already been extended once, and Petitioner is still very much constrained by Reg. 210.62(b).

More to the point, however, is the troublesome precedent created by the Emergency Appeals Court. This case, following closely upon De Rieux v. The Five Smiths, Inc., 499 F.2d 1303 (Em.App. 1974), and California v. Simon, 504 F.2d 750 (Em.App. 1974), makes plain that Court's belief that it may decide for itself whether the Administrator had "in fact 'good cause' to find" that Administrative Procedure Act §553 need not be followed (Pet., App A, p. 32). Moreover, each of these three cases evinces its further belief that it could do so on judicial notice (Id. at 33).

But dispensing with rulemaking procedures is a discretionary act, to be "upheld on the same basis articulated by the agency itself," Burlington Truck Lines, Inc. v. United States, 371 U.S. 164, 169 (1962). The Emergency Appeals Court must "judge the propriety of such action solely by the grounds invoked by the agency", SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). As a construction of 5 U.S.C. §553, the opinion below is of much wider significance even than its impact on the pervasive government regulation of energy matters. And it unavoidably conflicts with the above-cited opinions of this Court.

The agency rationale for avoidirg public participation was not any belief in an emergency requiring instantaneous action. As the Appeals Court found (Pet.,

App A, p. 32) and the Government is forced to admit (BR. p. 5), Gordon Reeves and others like him, vitally interested in FEO regulations, were excluded from commenting on Reg. 210.62(b) because it was (supposedly) "due to the need for 'immediate guidance.'" Ibid. Had the Court below properly focussed its review on that stated reason, it would have been forced to invalidate the regulation.

Clearly, the "interpretative" exception to §553 did not apply. This was no clarification of existing Reg. 210.62, which was admittedly designed to prohibit "modifying normal business practices to circumvent the allocation regulations" (BR p. 2) (Emphasis supplied). There were and are no allocations of Reeves' sales to the public. It plainly was a new, substantive regulation. Columbia Broadcasting System v. U.S., 316 U.S. 47 (1942).

A review of the question of whether the "interpretative" exception applied exhausts the scope of review, for that is all that the agency relied upon. But even a determination of impracticability, as allowed by 5 U.S.C. §553 would be erroneous. That term applies where delay would cause the very evil the regulation is designed to thwart. E.g., De Rieux v. The Five Smiths, Inc., 499 F.2d 1303 (Em. App. 1974) (advance notice of proposed price freeze would cause accelerated wage-price spiral). Cf. Bonfield, Military and Foreign Affairs Rulemaking Under the APA, 71 MICH. L. REV. 221, 304 (1972).

The ramifications of the opinion below, for compliance by all federal

agencies with APA requirements, are substantial. It invites a procedure which nullifies that section, and the opinion should be reviewed and reversed.

2. Submission For Antitrust Review.

Because there is no indication that the Emergency Petroleum Allocation Act will at any time soon be replaced, the question of antitrust review remains of significance.

The Court below thought that the existence of the Administrative Procedure Act and the provision in Section 7 of the EPAA for a 45-day review of the effectiveness of the Act precluded submission of amendments to the EPAA regulations for antitrust review. Although the Emergency Appeals Court made passing reference to one portion of the Legislative History, it completely ignored major parts of the debate which indicated an intent contrary to that found below. Moreover, the existence of the Administrative Procedure Act has no bearing on whether the agency is bound by other requirements. Section 6(c)(3) of the EPAA calls for the expertise of the Justice Department and the Federal Trade Commission to review energy regulations for anticompetitive effects. The APA serves entirely different purposes, calling for public comment to enlighten bureaucratic personnel who might not appreciate differing points of view without such comment and participation.

Finally, a 45-day study of the energy regulatory proceedings implemented pursuant to the statute hardly takes care of

anticompetitive effects of amendments after that time, nor is it a valid substitute for an opportunity to redirect regulations before their implementation if anticompetitive effects are found.

3. The Rationality of Standardless Imposition of Retail Allocation on Service Stations.

The Government continues to take what is an impossibly contradictory position. We do not yet understand it to contend that allocation authority was granted by the EPAA over the retail sales of gasoline. Nor do we understand the Government to contend it had authority from any other statutory source to impose regulations upon the sales of retail gasoline. Moreover, it admits that there was not enough gasoline to fill all demands of all purchasers. Its response was to cast upon the retailer the entire burden of making supplies stretch to purchasers. We continue to contend that such standardless delegation completely lacks rationality, exceeded statutory authority, failed to implement any statutory goals, and cast the retailer into the impossible position of destroying established relationships and the retailer's business as well as forcing the retailer to "bear the brunt of the public wrath".

There is nothing in the record, or available to this Court, to indicate that any other statutory program will supersede this regulation. The problem is one of continuing critical importance for thousands of retailers, and we urge the

Court to grant review and reverse the Court below.

Respectfully submitted,

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March 1975